Filed 4/19/19 P. v. Benjamin CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

THE PEOPLE, Plaintiff and Respondent, v. RONALD JAY BENJAMIN, Defendant and Appellant.	C083549 (Super. Ct. No. CR032618)

Believing Cedric Trejo and Nathan Wilson had stolen his marijuana, defendant Ronald Jay Benjamin followed them to a garage where he shot each of them. Convicted of special-circumstance first-degree murder of Cedric Trejo and premeditated and

deliberate attempted murder of Nathan Wilson, with several enhancements, and sentenced to multiple, consecutive indeterminate terms, defendant appeals. He contends (1) his confession should have been suppressed because he did not make a valid waiver of his *Miranda*[1] rights and his confession was not voluntary, (2) the trial court erred by denying his motion for mistrial when the jury was deadlocked, (3) the trial court erred by refusing a proposed pinpoint instruction that a person with an intellectual disability is more likely to confess, (4) the evidence of attempted robbery was insufficient to support felony-murder or the robbery special circumstance, and (5) the trial court erred by refusing to instruct on voluntary manslaughter based on heat of passion.

We conclude (1) defendant's confession was admissible because he made a valid *Miranda* waiver and his confession was voluntary, (2) the trial court acted within its discretion in denying the motion for mistrial, (3) the trial court did not abuse its discretion in declining the proposed pinpoint instruction, (4) substantial evidence supports the first degree murder conviction and robbery special circumstance, and (5) there was insufficient evidence to support an instruction based on heat of passion. We also conclude (6) the matter must be remanded for the trial court to exercise its newly-enacted discretion on whether to dismiss firearm enhancements, and (7) the abstract of judgment must be corrected to conform to the judgment.

BACKGROUND

In recounting the background, we will refer to certain individuals by their first names for clarity. In February 2014, defendant was staying with Elaine (defendant's aunt) in Susanville. Late one evening, Nathan (defendant's uncle), Lindsay (defendant's cousin), and Cedric were out together. They stopped at Elaine's house and Lindsay went

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[1] *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

into the house while the others waited outside. Delwood (Nathan's brother and defendant's uncle) was also outside Elaine's house.

When Lindsay came out of the house after about 10 minutes, Lindsay, Nathan, and Cedric walked about a half mile to a detached garage in an alley. Nathan saw someone down the road, but he was not sure whether that person was following them.

Inside the garage, Cedric and Nathan sat down while Lindsay went into a separate side room. Nathan heard a voice saying, "Is that you, Nate?" The voice sounded like defendant's. Someone opened the door, and Nathan was about to respond when he saw a flash and was hit by a bullet. Cedric was also shot. In all, Nathan was shot five times. Nathan fell to the ground, and Cedric ran out of the garage but fell and died in the alley.

Responding officers observed tracks in the snow leading from the garage to a rock where the officers found a gun and a hat with a "C" on it. Meanwhile, at the hospital, Nathan could not talk. In notes, he wrote, "Ronald did it," and "Cedric dead, Ronald." Later, when defendant was at the hospital, Nathan became agitated and wrote, "Why did Ron wanna come here to finish it?"

Bullet casings found at the garage were fired from the gun found by the rock. The hat and the gun both had DNA consistent with defendant's DNA on them.

Defendant was arrested near Colusa in January 2015, 11 months after the shootings. Detective Richard Warner of the Susanville Police Department interviewed defendant for two hours at the Glenn County jail. After first denying involvement in the shootings, defendant admitted he was angry with Nathan and Cedric because he believed they had taken his marijuana, which he used to relieve back pain, and he was frustrated with the way they treated him. He determined that he "had to retaliate. Show 'em I'm no one to fuck with." He followed them to the garage and shot them. Defendant said his plan was to take whatever they had and then try to find his marijuana. He said he abandoned the gun and hat after the shooting.

Some evidence at trial suggested that Delwood was also in the area of the garage on the night of the attack. At trial, Nathan equivocated on many of his earlier statements and his preliminary hearing testimony. He testified he thought his brother Delwood was the one who shot him.

Defendant presented evidence that he had a mild intellectual disability. A psychologist, Dr. Laura Morrison, administered an IQ test to defendant, who scored within the range of a mild intellectual disability for verbal comprehension, working memory, and processing speed. His score for perceptual reasoning was in the borderline range of mild intellectual disability. Those scores placed defendant in the lowest 1 to 2 percent of the population.

A jury convicted defendant of the first degree murder of Cedric (Pen. Code, § 187, subd. (a) -- count one),[2] also finding true a special circumstance of murder during the commission or attempted commission of robbery (§ 190.2, subd. (a)(17)(A)) and that defendant discharged a firearm causing death (§ 12022.53, subd. (d)). The jury also convicted defendant of the premeditated and deliberate attempted murder of Nathan (§§ 664/187, subd. (a); 189 -- count two), also finding that defendant discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). Moreover, on counts one and two the jury found true enhancement allegations pursuant to subdivisions (b) and (c) of section 12022.53 [personal use and personal discharge of a firearm]. Additionally, the jury found defendant guilty of assault with a firearm on Cedric and Nathan (§ 245, subd. (a)(2) -- counts three and four), both with findings that defendant personally used a firearm during the commission of the crime (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)).

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[2] Undesignated statutory references are to the Penal Code.

The trial court sentenced defendant to life without the possibility of parole on count one with an additional term of 25 years to life for the firearm discharge enhancement, plus a consecutive term of life with the possibility of parole on count two with an additional term of 25 years to life for the firearm discharge enhancement. The trial court imposed and stayed terms for the lesser findings under section 12022.53 on counts one and two, and it imposed and stayed terms for counts three and four.

Additional background is set forth in the discussion as relevant to the contentions on appeal.

DISCUSSION

I

Defendant contends the trial court erred in declining to suppress his confession. He argues he did not make a knowing and intelligent waiver of his *Miranda* rights and his confession was not voluntary.

A

"[T]o counteract the coercive pressure inherent in custodial surroundings, '*Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. [Citation.] After the warnings are given, if the suspect indicates that he wishes to remain silent . . . [or] wants an attorney, the interrogation must cease . . . . Critically, however, a suspect can waive these rights.' " (*People v. Williams* (2010) 49 Cal.4th 405, 425 (*Williams*), citing *Maryland v. Shatzer* (2010) 559 U.S. 98 [175 L.Ed.2d 1045].) To establish a valid waiver, the People must show by a preponderance of the evidence that the waiver was knowing, intelligent, and voluntary. (*Williams, supra*, 49 Cal. 4th at p. 425; accord, *People v. Nelson* (2012) 53 Cal.4th 367, 374-375 (*Nelson*).) Although there is a threshold presumption against finding a *Miranda* waiver, the question is whether the waiver was knowing, intelligent, and voluntary under the totality of the circumstances. (*Nelson, supra,* at p. 375.)

With respect to an initial waiver before commencement of interrogation (as opposed to a subsequent invocation of the right to counsel during questioning), there is no "predetermined form" for a valid waiver. (*Williams, supra,* 49 Cal. 4th at pp. 427-428.) Waiver may be implied. A defendant's willingness to answer questions after acknowledging an understanding of *Miranda* rights will often constitute an implied waiver under the totality of the circumstances. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 383-384 [176 L.Ed.2d 1098, 2261]; *People v. Cunningham* (2015) 61 Cal.4th 609, 642; *Nelson, supra,* 53 Cal.4th at p. 375 [15-year-old who had two prior arrests impliedly waived *Miranda* rights by answering questions after stating he understood those rights].)

In reviewing the trial court's denial of a suppression motion on *Miranda* and involuntariness grounds, " ' " 'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.' " ' " (*People v. Duff* (2014) 58 Cal.4th 527, 551.) " ' " 'We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' " ' " (*Ibid.*) We consider only the evidence presented to the trial court in connection with the suppression motion. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77, fn. 18.)

B

The trial court held a hearing on defendant's motion to suppress his confession. The three principal sources of evidence were an audio recording and transcript of Detective Warner's interview with defendant, the testimony of Sally Farmer, Ph.D., a clinical psychologist, and the testimony of Detective Warner.

Defendant was interviewed by Detective Warner at the Glenn County Jail on January 15, 2015, about 11 months after the crimes. During the interview, Detective Warner gave defendant the following warnings:

"[Detective Warner]: So before I go ahead and ask you any more questions I'm going to advise you of your rights. Ok, the rules for me, alright, my agency makes me do

this, the rules for me is that I actually have to hear you say yes or no to my questions. Does that make sense?

"[Defendant]: Yeah.

"[Detective Warner]: So like, 'yeah,' they won't accept yeah. I have to hear yes or no. So you have the right to remain silent, do you understand?

"[Defendant]: Yes.

"[Detective Warner]: Anything you say may be used against you in court, do you understand that?

"[Defendant]: Yes.

"[Detective Warner]: You have the right to the presence of an attorney before and during any question[ing], do you understand?

"[Defendant]: [yawns] Yes.

"[Detective Warner]: If you cannot afford an attorney, one will be appointed for you free of charge before any questioning if you want, do you understand?

"[Defendant]: Yes.

"[Detective Warner]: Ok. No questions about any of those rights. You don't need me to explain any of them to you?

"[Defendant]: Ah-um, no."

Detective Warner did not solicit an express waiver of *Miranda* rights.

Defendant focuses on the following portions of the two-hour interview that he claims evinced his confusion regarding his right to counsel:

A detective named Nathan Horton who participated to some extent in the interview explained to defendant that the authorities had evidence against him. Detective Horton said: "If you want to keep playing like you don't know, we're not going to waste our time sitting here. But this is your one and only chance to say . . . because we know you're not the only person . . . so if you want to take the full of it . . . ." (Ellipses in original.) Defendant said: "So you could put me in jail without uh, without my lawyer?"

He followed that immediately with: "You could put me in jail and take me to prison without my lawyer?" He was assured that he would get a trial but that he could be arrested without a lawyer. Defendant said: "You're arresting me for murder." And Detective Warner responded: "Yeah." Earlier, defendant had been told he was being arrested on a warrant for homicide.

When defendant maintained his innocence, trying to explain away the evidence, Detective Warner told him the investigation indicated his guilt. Defendant wanted to know what the evidence was, and Detective Warner replied: "Well that's . . . you can get that from your attorney through the discovery process. This right here, this doesn't operate like this. OK. [¶] You either want to talk to us [about] what happened and why it happened, or you don't. But it's not my job right now to tell you what I have learned in my investigation. You're the one that's sitting in here for murder, not me. I'm the one that's investigating it."

Detective Warner said: "So if you want to tap dance, you want to just play around, you want to tell us all kinds of lies, we don't have time for that. We'll get up and walk out, and that will be your last opportunity to get your statement in here of why this happened. Why you had to shoot these guys. That's the last opportunity. [¶] Because after this you're going to get a lawyer. [¶] And guess what, I won't talk to you again after that."

At the hearing on the suppression motion, Dr. Farmer testified that she interviewed defendant for two hours and reviewed court documents and his school records. She also reviewed Detective Warner's interview of defendant. Ten or 11 years earlier, when defendant was in school, he was tested and determined to have an IQ of 66, with a verbal score of 60. She testified that IQs do not tend to change over time. An average IQ score is around 100, and defendant's IQ would put him in the lowest 1 percent. Dr. Farmer said that individuals in that range are considered to have a mild intellectual disability. Defendant had some difficulty with abstract thought.

In Dr. Farmer's opinion, defendant did not understand the right to remain silent. Defendant told Dr. Farmer that although he understood what silent meant when he spoke to Dr. Farmer, he did not know what silent meant when he was interviewed by Detective Warner. When Dr. Farmer asked defendant if he understood that he had a right to have an attorney present at the interview, he responded that he did not think he needed an attorney because he assumed that, if he needed an attorney, one would be provided. He did not realize he had to specifically ask for an attorney. Concerning the warning that his words could be used against him, defendant said he thought that meant he could say anything he wanted to say and his attorney "would take care of it." Defendant told Dr. Farmer that he confessed to gain credibility with the Norteño gang. Dr. Farmer did not believe that defendant had the mental capacity to rationally evaluate his choices at the time of the interview, although he understood that, by confessing, he would subject himself to incarceration.

Dr. Farmer testified that a more in-depth evaluation would either confirm or refute her conclusions, but it was unlikely that her conclusions would be refuted. She said defendant was able to understand and waive any confidentiality with respect to her interview and evaluation.

Detective Warner testified that he detected no indication that defendant had an intellectual disability when he interviewed defendant. Defendant responded appropriately to questions and seemed to understand what was being asked.

The trial court listened to the audio recording of the interview and considered the arguments of counsel before denying the suppression motion. The trial court ruled that defendant made a knowing and intelligent *Miranda* waiver, and his confession was a product of free will and rational choice. The trial court found an implied waiver because defendant was advised of his rights, understood those rights, and voluntarily answered Detective Warner's questions. After listening to the audio recording of the interview, the trial court determined the *Miranda* rights were clearly stated and defendant said he

understood them in each instance. The trial court said defendant manifested an ability to understand concepts more complicated than the rights he waived. For example, he correctly used the words hearsay, retaliate, hypocrite, innocent, and hacker, and idioms such as hearing something through the grapevine and pushing something to the limit. He also gave direct, coherent, and responsive answers during the interview. He exhibited abstract thinking, such as explaining that one person involved was more innocent than another, and he was calm and relaxed during the interview, except when he confessed to the shooting. The tone of the interview was conversational.

Regarding Dr. Farmer's testimony, the trial court said it was not able to accept many of her opinions concerning defendant's ability to understand the *Miranda* warnings. The trial court noted that Dr. Farmer believed further investigation would confirm or refute her conclusions. The trial court said the evidence of defendant's IQ was "scant" because it was based on a notation in a school record without actual results or information concerning the expertise of the tester. The trial court also did not credit Dr. Farmer's testimony about whether defendant understood his *Miranda* rights because she simply accepted what defendant told her, even though she acknowledged she did not know whether defendant lied to her.

The trial court said the record established that defendant was not opposed to talking to Detective Warner, and there was no evidence the detective took unfair advantage of defendant's mild mental disability. According to the trial court, defendant's statements about whether he could be put in jail or prison without a lawyer did not indicate he was unaware of what he waived.

Based on the totality of circumstances, the trial court concluded defendant's confession was in his own words, was not the result of leading questions, and was knowing, intelligent, and voluntary.

C

Defendant argues he did not make a knowing and intelligent waiver of his *Miranda* rights.

In support of his argument, defendant relies primarily on *United States v. Preston* (9th Cir. 2014) 751 F.3d 1008 (*Preston*), in which the Court of Appeals concluded the district court erred in admitting evidence of a confession. (*Id*. at pp. 1027-1028.) But *Preston* is distinguishable. Unlike in this case, *Preston* involved a defendant whose intellectual disability was severe. (*Id*. at pp. 1027-1028.) In addition, the police threatened that its repetitive questioning would continue without end, used multiple deceptions about how the defendant's statement would be used, and made false promises of leniency and confidentiality. (*Id*. at p. 1028.) And the psychologist who interviewed the defendant opined that Preston's severe intellectual disability made him more susceptible to interrogative pressure. (*Id*. at p. 1021.) There is no such evidence in this case. Moreover, here the trial court found Dr. Farmer's expert testimony unpersuasive, and found, in reviewing the recording and the transcript of the interview, that defendant understood the circumstances and wanted to talk to the police.

Defendant disagrees with many of the trial court's comments. For example, he finds fault with the trial court's statement that there was scant evidence of defendant's IQ scores and how the IQ tests were administered. Defendant claims the trial court's characterization of the IQ evidence was a "slap in the face" to those who administered the test and maintained the education records. But the trial court said defendant's IQ was not proven to the court's satisfaction because the only evidence of defendant's IQ was a notation in a school record without test results or information concerning the expertise of the tester. Defendant's challenges to the trial court's comments fail because we do not reweigh the evidence, and the relevant appellate record does not clearly contradict the trial court's findings.

Defendant argues that during the exchange referencing the police being able to put him in jail or prison without a lawyer, the detectives misled him by suggesting he had no right to a lawyer. But the argument mischaracterizes the exchange, because the detectives never said defendant did not have a right to a lawyer.

Defendant next points to the exchange in which Detective Warner said defendant could get information from his attorney through the discovery process. Defendant claims this exchange told defendant he could not have an attorney until discovery began, especially when Detective Warner said: "This right here, this doesn't operate like this." Again, defendant mischaracterizes the exchange. It had nothing to do with defendant's right to counsel. Instead, it was about whether defendant had a right to know, during the interview, what evidence the detectives had against him.

Finally, defendant focuses on the statement, "Because after this you're going to get a lawyer. And guess what, I won't talk to you again after that." Defendant argues this told him he was not entitled to an attorney during questioning. To the contrary, defendant had already been told he had the right to an attorney during questioning. Detective Warner's statement merely anticipated that defendant would obtain an attorney after the interview and that the detectives would not have another opportunity to interview him.

We are certainly sensitive to the possibility that an individual with an intellectual disability might not have made a knowing waiver. But here, based on the trial court's detailed findings and our own review of the record, we conclude defendant made a knowing and intelligent waiver of his *Miranda* rights.

D

Defendant also argues his confession was not voluntary because (1) the trial court erred in concluding that defendant did not have an intellectual disability, (2) Detective Warner continued to question defendant after defendant demonstrated he did not understand his right to counsel, and (3) defendant was pressured to confess. The

arguments lack merit. The trial court never said defendant did not have an intellectual disability. Rather, the trial court found that even if defendant had a low IQ, that was not a basis, by itself, to assume lack of understanding or incompetency or inability to voluntarily confess. The trial court found that defendant did in fact understand and concluded that defendant's confession was voluntary. Substantial evidence supports the trial court's findings.

II

Defendant next contends the trial court erred in denying his motion for mistrial after the jury informed the trial court that it was deadlocked.

A

Under section 1140, a trial court has discretion to declare a mistrial or order further deliberations when a jury indicates it is deadlocked as to one or more charges against a defendant. (*People v. Bell* (2007) 40 Cal.4th 582, 616, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) However, " '[t]he court must exercise its power . . . without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." [Citation.]' [Citation.]" (*People v. Whaley* (2007) 152 Cal.App.4th 968, 980.) The court "may direct further deliberations upon its reasonable conclusion that such direction would be perceived ' "as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered." [Citation.]' [Citation.]" (*People v. Proctor* (1992) 4 Cal.4th 499, 539.)

A trial court ordering further deliberation may not encourage jurors to consider the numerical division or preponderance of opinion of jurors in forming or reexamining their views, and may not state or imply that if the jury fails to agree the case will necessarily be retried, such as with the *Allen* charge given in *Allen v. United States* (1896) 164 U.S.

492 [41 L.Ed. 528]. (*People v. Gainer* (1977) 19 Cal.3d 835, 852 (*Gainer*), disapproved on other grounds in *People v. Valdez* (2012) 55 Cal.4th 82, 163-165.)

B

The jury began deliberations on the morning of the ninth day of trial. In the afternoon on the 10th day of trial, the jury notified the trial court that it was unable to agree on a verdict. The jury's note to the trial court stated that many believed defendant was guilty, some were not sure, and one had a reasonable doubt of defendant's guilt. In open court, the trial court read the note aloud and asked the foreperson if further deliberations might result in a verdict. The foreperson said, "Perhaps, but I don't think so." The trial court asked whether there was anything that could be done, like readback of testimony or further instructions on the law. The foreperson said that the only possible clarification would be concerning the definition of reasonable doubt. The trial court said that the instruction was already given and that the parties covered it in their arguments.

The trial court polled the jurors on whether they believed further deliberations would be useful. Every juror expressed doubt that further deliberations would result in a verdict. The trial court asked about balloting, and the foreperson said they had voted twice. The vote changed between the first and second ballots. The primary issue preventing jury consensus was who did the shooting. Two of the jurors had a doubt about the shooter's identity that they believed was reasonable.

The trial court told the jury that it would read the reasonable doubt instruction again and send the jury back to deliberate. The trial court said: "[T]ry this one final effort because we spent a lot of time on this. This happens at times and if the case has to be retried, so be it, but let's make sure we've exhausted the efforts we can. I'm not trying to pressure you one way or the other now in terms of coming to a verdict, I want to make sure you've done everything you can to fully deliberate." The trial court then reread instructions on reasonable doubt and deliberations.

After the jury left the courtroom, defense counsel expressed a concern that the proceedings put pressure on the two jurors expressing doubt to change their votes. For that reason, defense counsel made a motion for a mistrial, which the trial court took under submission.

Later in the afternoon of the 10th day of trial, the jury sent another note to the trial court stating that some of the jurors believed one juror was unwilling to deliberate. The trial court brought the foreperson into the courtroom for clarification. The foreperson said that the juror in question had listened to the other jurors but did not participate much. The juror said he had a doubt but said he did not know why he had a doubt. The trial court asked the foreperson whether further deliberations would be useful, and the foreperson responded that it was possible. The foreperson said that even the juror who had expressed doubt thought further deliberations could be fruitful. The most recent juror ballot had changed from the previous ballot. The trial court again polled the jurors about whether further deliberations would be useful. Three jurors said there was a possibility they could reach a verdict, while nine jurors said they did not think continuing deliberations would result in a verdict. Given the fact that some jurors thought more deliberations might help, the trial court continued the case to the next week for further deliberations. Before the jurors were excused for the day, the trial court read to them CALCRIM No. 3551, which encourages the jury and gives suggestions on further deliberations.

Defense counsel again expressed concerns that encouraging the jury to try to reach a verdict, knowing that only one or two jurors were expressing doubt, put undue pressure on the jurors. Noting that its instructions were neutral, the trial court disagreed. The trial court denied defendant's motion for mistrial.

When the jury returned the next week for the 11th day of trial, it deliberated through the morning and, after lunch, sent a note to the trial court that it had reached a verdict.

C

Defendant argues the trial court coerced holdout jurors into changing their votes by encouraging the deadlocked jury to continue deliberations, referring to holdout jurors changing their votes as progress, refusing to accept the opinion of jurors that further deliberations would not produce a verdict, and requiring the jury to return to deliberations after a weekend. We disagree.

The trial court encouraged the jurors to continue deliberating but openly recognized they might not be able to reach a verdict and told them it was not trying to pressure them. Even though the jurors evinced frustration and doubted whether a verdict could be reached, there were indications that progress toward a verdict was being made.

In *People v. Breaux* (1991) 1 Cal.4th 281, a jury deadlocked with one holdout juror after four days of deliberations in the penalty phase of a death penalty trial. The trial court twice asked the jury to resume deliberations after an apparent impasse. The trial court inquired concerning the numerical division among the jurors, which was 10-to-2. The second time the jury reached an impasse, the trial court polled the jury and found that all jurors were negative about the prospect of a verdict. Yet the trial court continued to require the jury to deliberate. (*Id.* at pp. 318-320.) The Supreme Court said in *Breaux*: "Nothing in the record suggests that the jury was coerced in any way. The judge made no threats, no statements that could be interpreted as exerting undue pressure on any juror. The judge was principally concerned that the jury had not deliberated for a sufficient time relative to the complexity of the case. He did not indicate that a verdict had to be reached and reminded the jurors of their right to an individual opinion. The judge did not threaten to prolong the deliberations; on the contrary, he indicated that he would call them back in approximately an hour. The court did not abuse the discretion vested in it by section 1140 to determine the reasonable probability of reaching a verdict." (*Id.* at p. 320.)

Here, the trial court did not coerce the jurors, it merely determined that there was still a possibility for them to reach a verdict and it asked them to continue deliberating for

an additional reasonable period of time. The trial court did not abuse its discretion in denying defendant's motion for mistrial.

III

Defendant further asserts the trial court erred by refusing to give an instruction requested by the defense stating that individuals with an intellectual disability are more likely to falsely confess.

The trial court has a duty to give instructions on the general principles of law involved in the case. (*People v. Silva* (2001) 25 Cal.4th 345, 371; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Moreover, upon request, a defendant is entitled to nonargumentative instructions that pinpoint the theory of the defense. (*People v. Webster* (1991) 54 Cal.3d 411, 443.) " '[H]owever, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories "is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate." [Citation.]' [Citation.]" (*People v. Roberts* (1992) 2 Cal.4th 271, 314.)

Relying on *Preston, supra,* 751 F.3d 1008, defendant requested the following pinpoint instruction: "The intellectually disabled are more likely to confess falsely for a variety of reasons. You should view any such confession with caution." The trial court denied the request. Defendant claims the trial court erred because the requested instruction is a correct statement of law and pinpointed the defense theory. We disagree.

Defendant relies on specific language in *Preston, supra,* 751 F.3d at pp. 1018-1019, to support the proposed instruction. That case said there was abundant research that individuals with intellectual disabilities are " 'more likely' " to confess falsely. (*Id.* at p. 1018, fn. 13) We have already explained that *Preston* is inapposite, but even if it was on point, we do not interpret the referenced portion of the *Preston* language as a binding holding. We also question the premise: it is one thing to do a historical survey and identify individuals with intellectual disabilities who have confessed falsely, but

quite another to state unequivocally that *all* individuals with intellectual disabilities are *more likely* to confess falsely. Defendant has not provided us with comprehensive research on this specific topic, and we are unwilling to assume that individuals with intellectual disabilities are generally likely to misunderstand what the word "silent" means or are generally likely to say things that are false. The trial court did not abuse its discretion in rejecting the pinpoint instruction.

IV

In addition, defendant argues his first degree murder conviction and robbery special circumstance must be reversed because there was insufficient evidence of attempted robbery to support felony-murder or the special circumstance.

The prosecution's argument and the jury instructions addressed two theories for first degree murder: premeditated murder and felony murder. The felony-murder theory was based on murder in the commission or attempted commission of a robbery. The jury also considered a robbery special circumstance. The jury found defendant guilty of first degree murder, without specifying a theory, and found true the robbery special circumstance.

A

When reviewing for the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) We do not reweigh the evidence or reassess the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Ibid.*)

First degree murder includes willful, deliberate, and premeditated killing. (§ 189, subd. (a).) It also includes a killing committed in the perpetration of, or the attempt to perpetrate, various enumerated crimes including robbery, otherwise known as felony murder. (§ 189, subd. (a); CALCRIM 540A.)

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) An attempt to commit a robbery includes (1) the specific intent to commit robbery and (2) a " 'direct but ineffectual act done toward its commission.' " (*People v. Watkins* (2012) 55 Cal.4th 999, 1018, quoting § 21a.) The act required must be more than mere preparation, and it must show that the perpetrator is putting his or her plan into action. That act need not, however, be the last proximate or ultimate step toward commission of the crime. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.) If "the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown. [Citation.]" (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764.)

A robbery special circumstance requires a finding that "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" robbery. (§ 190.2, subd. (a)(17)(A).)

B

During his interview with Detective Warner, defendant said he was upset that Nathan and Cedric had taken his marijuana. When he discovered they had taken his marijuana, he followed them to the garage. Defendant said he wanted to retaliate because they deserved it, but he also wanted to "grab the money and grab [Nathan's] shit or whatever, or whatever he has on him, and then try to find my weed." He shot Nathan and Cedric, but there is no evidence he took anything from them.

Defendant argues the evidence of attempted robbery in this case is insufficient because he merely thought about robbing the victims and did not take a direct but ineffectual step toward its commission. We disagree. Based on the evidence, the jury could reasonably infer that defendant followed the victims to the garage with the intent to rob them and shot them with the intent to rob them. Those were direct but ineffectual steps toward the commission of a robbery, even though he did not complete the robbery by taking their property. That defendant may also have had a dual intent to retaliate for what Nathan and Cedric had done does not negate the inference that he followed them and shot them to rob them. Moreover, although defendant points to his statement that he abandoned his intent to rob the victims when the gun went off accidentally, the jury was not required to accept that version of events.

On this record, there is sufficient evidence to sustain defendant's first degree murder conviction even if it was based on a felony-murder theory, and to sustain the true finding on the special circumstance.

V

Defendant contends the trial court erred by refusing to instruct on voluntary manslaughter based on heat of passion. The trial court denied the defense's request for voluntary manslaughter and attempted voluntary manslaughter instructions because the evidence did not support convictions for the lesser offenses.

The duty to instruct on lesser included offenses, or a theory thereof, only arises if there is substantial evidence to support the instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 155; *People v. Barton* (1995) 12 Cal.4th 186, 203.) "Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*People v. Beltran* (2013) 56 Cal.4th 935, 942, fn. omitted.) "A heat of passion theory of manslaughter has both an objective and a subjective component." (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).)

To satisfy the objective element, " ' "the accused's heat of passion must be due to 'sufficient provocation.' " [Citation.]' " (*Moye, supra*, 47 Cal.4th at p. 549.) " 'The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations].' " (*Id.* at p. 550.) Provocation may occur over time. (*People v. Wharton* (1991) 53 Cal.3d 522, 569.)

To satisfy the subjective element, "the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' [Citation.] ' "However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . ." [Citation].' [Citation.]" (*Moye, supra*, 47 Cal.4th at p. 550.)

Defendant claims he was provoked when Nathan and Cedric stole his marijuana, which he used to relieve back pain. In his interview with Detective Warner, defendant said that someone entered his room and stole his marijuana while he was asleep. When he woke up, he saw Nathan and Cedric, with others, walking down the street. They had stolen his marijuana before and exchanged it for other drugs at the casino, and they refused defendant's demands for compensation. Defendant followed them.

Defendant tried to get over his emotions, to let it go, but he decided to retaliate. He told Detective Warner that he went to the garage and "[s]omething took over me. It was a demon inside of me took over me . . . ." He referenced all the "bad shit" at the house that "got into" him, all the tension when he was going to church with his aunt and "[t]rying to do right." He said he was trying to find a different cure for his back, but he did not know what he was going to do without weed, so he did not know what else to do.

Defendant said he was thinking of a "lot of bad things" and he pushed it to the limit by accident. He explained that he wanted to go over there with a bat but he was "just too pissed, you know." So he took the gun out of his jacket and aimed it at his uncle. He continued: "[A]t first I was telling myself to just grab the money and grab his shit or whatever, or whatever he has on him, and then try to find my weed. And then that'd be it. But no, you know, I had it on safety, I thought I did, and then I think I gripped it too much and then 'boom' just said, 'fuck it.' "

The evidence does not support a finding of heat of passion. Defendant had time to cool off as he left the house and walked half a mile to the garage. Revenge is not the same as heat of passion. (*People v. Daniels* (1991) 52 Cal.3d 815, 868.) But even if his passions might have been aroused, the circumstances were not sufficient to arouse the passions of a reasonable person. (*People v. Logan* (1917) 175 Cal. 45, 49.) An ordinarily reasonable person would not have committed these crimes under similar provocation. The trial court did not err in declining to give the requested instructions.

VI

On October 11, 2017, the Governor signed Senate Bill No. 620 (2017-2018 Reg. Sess.; Stats. 2017, ch. 682, § 2). The bill amended sections 12022.5 and 12022.53, effective January 1, 2018, and gave trial courts discretion to strike or dismiss firearm enhancements imposed pursuant to those sections. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) The amendments apply to cases, such as this case, not yet final at the time the amendments became effective. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

Unlike the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, here, we cannot say "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." The only statement the trial court made concerning imposing the terms for the firearm enhancements was that it was mandatory, which was true at the time of sentencing.

Accordingly, we will remand for the trial court to exercise its discretion whether to strike or dismiss any or all firearm enhancements.

We express no opinion as to how the trial court should exercise its newly enacted discretion on remand. We only conclude that, under the circumstances of this case, the trial court should be provided the opportunity to exercise its discretion in the first instance. (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228 [noting it is generally appropriate to remand for resentencing when a court proceeded through sentencing erroneously believing it lacked discretion to act in a certain way].)

We address this issue and order remand on our own motion, without requesting supplemental briefing. We do so in the interest of judicial economy. (*People v. Taylor* (2004) 118 Cal.App.4th 454, 456.) Any party aggrieved may petition for rehearing. (*Id.* at p. 457; Gov. Code, § 68081.)

VII

Based on our review of the record, we conclude the abstract of judgment reflecting the determinate terms must be corrected. As prepared, the abstract fails to note the true finding under section 12022.7, subdivision (a) on count four. It also fails to note that the enhancements associated with counts three and four are stayed pursuant to section 654. "Where the base term of a sentence is stayed under section 654, the attendant enhancements must also be stayed." (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 709, disapproved on other grounds by *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, fn. 8.) We will direct the trial court to correct the abstract.

DISPOSITION

We remand to allow the trial court to exercise its sentencing discretion under sections 12022.5, subdivision (c) and 12022.53, subdivision (h) concerning whether to strike or dismiss the firearm enhancements. The judgment is otherwise affirmed. In addition to the possibility of amending the abstract of judgment regarding the trial court's exercise of discretion in connection with the firearm enhancements, the trial court is

directed to correct the determinate abstract of judgment by adding the true finding under section 12022.7, subdivision (a) on count four, and indicating that the enhancements associated with counts three and four are stayed pursuant to section 654. The trial court shall send the amended and/or corrected abstract of judgment to the Department of Corrections and Rehabilitation.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
ROBIE, J.